IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.10.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Writ Petition No.23274 of 2002
and
W.M.P.No.32074 of 2002

M/s.Krishna Alloy Steels
69, N.M. Road
Aminjikarai, Chennai 29. ... Petitioner

Vs.

1. The Registrar
Tamil Nadu Taxation Special Tribunal
Singaravelar Maaligai
Rajaji Salai,Chennai 1.

2. The Commmercial Tax Officer
Vadapalani Assessment Circle
Chennai 29. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of certiorarified mandamus to call for the records on the file of the first respondent in O.P.No.52 of 2002 dated 26.2.2002 confirming the order of the second respondent dated 31.10.1995 and quash the same as illegal, contrary to law relating to the portion of the order levying penalty under Section 12(3)(b)of the TNGST Act.

For Petitioner: Mr.A.Thiyagarajan
For Respondents: Mr.R.Tholkappian
Government Advocate (Taxes)

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ORDER

(Order of the Court was delivered by K.RAVIRAJA PANDIAN, J.)

The writ petition is filed challenging the correctness of the order made in O.P.No.52 of 2002, whereby the Taxation Special Tribunal rejected the prayer of the petitioner for deletion of the penalty imposed on it under Section 12(3)(b) of the TNGST Act.

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2. For the assessment year 1993-94, the writ petitioner a manufacturer of steel and Iron rough castings reported a total and taxable turnover of Rs.68,60,790.10 and Rs.66,44,492.10 respectively in the monthly returns in Form 1 under the TNGST Act. While framing the assessment, the assessing officer checked the returns with the books of accounts and almost all the details furnished by the assessee has been accepted however, the details in the books of accounts stated that the first sales of cast iron rough sketch under Section 3(3) of the Act taxable at 3% was for a turnover of Rs. 17,68, 302/- Only that portion of the turn over has been rejected by the assessing officer on the ground that the Supreme Court has ultimately settled the issue that the cast iron rough castings are declared goods and are liable to be assessed to tax at 4% falling under the second schedule under the TNGST Act. In view of that the petitioner was not eligible to claim levy of tax at 3% on the strength of Form 17 declaration and on that score the turn over in a sum of Rs.17,88,302/- was altered to be assessed to tax at the rate of 4% instead of 3% . The assessing officer was also of the view that in view of the defect in the assessment as stated above, the assessee is liable to pay penalty under Section 12(3)(b(v) of the TNGST Act and levied penalty in a sum of Rs. 3,64,041/-. The assessee aggrieved by the penalty alone filed the O.P. before the Tribunal, which has been dismissed. The correctness of the order of the Tribunal is put in issue in this writ petition.

3. Learned counsel appearing for the petitioner submitted that the issue with regard to levy of penalty under Section 12(3)(b)(v) has been settled long back by the supreme Court in the decision reported in 28 STC 700 (STATE OF MADRAS VS. JAYARAJ NADAR & SONS). Subsequently, the issue has also been considered by the Division Bench of this Court in the decision in APOLLO SALINE PHARMACEUTICALS (P) LIMITED (Fac) VS. COMMERCIAL TAX OFFICER & OTHERS (125 STC 505). In those cases, the Supreme Court as well as the Division Bench has held that sub-section (2) of Section 12 empower the assessing authorities to assess the dealer to the best of its judgment in two events: (i) if no return has been submitted by the dealer under sub-section (1) within the prescribed period, and (ii) if the return submitted by him appears to be incomplete or incorrect. Sub-section (3) empowers the assessing authority to levy the penalty only when it makes an assessment under sub-section (2). In other words, when the assessing authority has made the assessment to the best of its judgment, it can levy a penalty. It is well known that the best judgment assessment has to be on an estimate, which the assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess-work is bound to be present in best judgment assessment but it must have a reasonable nexus to the available material and the circumstances of each case. Where account books are accepted along with other records there can be no ground for making a best judgment assessment. In this case also as held by the Supreme Court and the Division Bench of this Court the return filed by

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the assessee has been taken as correct with reference to the books of accounts and the one and only infraction found by the assessing officer was that in respect of the cast iron rough castings the assessee claimed 3% tax on the strength of Form 17. That has also been accepted by the assessing officer, however , in view of the decision of the Supreme Court in Vasantham Foundry's case wherein cast iron and rough castings have been declared as declared goods coming under the second schedule to the TNGST Act. That portion has been taken out from the return and assessed to tax at 4% . That cannot be regarded as an assessment under Section 12(2) or otherwise called as best judgment assessment .

4. We heard the arguments of the learned counsel on either side and perused the materials on record.

5. The Division Bench of this Court after taking note of the Jayaraj Nadar 's case reported in 28 STC 700, in the case of APPOLLO SALINE PHARMACEUTICALS (P) LIMITED VS. COMMERCIAL TAX OFFICER (Fac) AND OTHERS (125 STC 505), wherein also a similar dispute has arisen has held as follows:-

> 5. The Supreme Court in the case of State of Madras v.Jayaraj Nadar & Sons [1971] 28 STC 700 at page 701 after extracting section 12(2) of the Tamil Nadu General Sales Tax Act, 1959 which remains in the same form even now, observed thus:
>
> "The question is whether penalty can be levied while making the assessment under sub-section (2) of the above section merely because an incorrect return has been filed. The High Court was of the view that it is only if the assessment has to be made to the best of the judgment of the assessing authority that penalty can be levied.
> It seems to us that the High Court came to the correct conclusion because sub-sections (2) and (3) have to be read together. Sub-section (2) empowers the assessing authority to assess the dealer to the best of its judgment in two events: (i) if no return has been submitted by the dealer under sub-section (1) within the prescribed period, and (ii) if the return submitted by him appears to be incomplete or incorrect. Sub-section (3) empowers the assessing authority to levy the penalty only when it makes an assessment under sub-section (2).
>
> In other words, when the assessing authority has made the assessment to the best of its judgment, it can levy a penalty. It is well known that the best

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judgment assessment has to be on an estimate which the assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess-work is bound to be present in best judgment assessment but it must have a reasonable nexus to the available material and the circumstances of each case: [see State of Kerala v. C. Velukutty [1966] 17 STC 465 (SC)]. Where account books are accepted along with other records there can be no ground for making a best judgment assessment."

6. The law so declared that the best judgment assessment is based on an estimate and is not one based solely on the account books was reiterated by the Supreme Court in the case of Commis sioner of Sales Tax, Madhya Pradesh v. H.M. Esufali H.M. Abdulali [1973] 32 STC 77.

7. Though other sub-sections of section 12 were amended by the State Legislature subsequent to the date of the judgment in the case of Jayaraj Nadar & Sons [1971] 28 STC 700 (SC), sections 12(1) and 12(2) have remained in the same form. The legislative intention therefore, except during the period December 3, 1979 to May 27, 1993 and on and after April 1, 1996 must be taken to be to, permit the levy of penalty only in case where the assessment is a best judgment assessment made on an estimate and not by relying solely on the accounts furnished by the assessee in the prescribed return. On and after April 1, 1996 an explanation has been added below section 12(3) which requires the turnover relating to the tax assessed on the basis of the accounts of the assessee, to be disregarded, while determining the turnover on which the penalty is to be levied under section 12(3).

8. The assessments for the assessment years 1993-94 and 1994-95 which were assessments made on the basis of the accounts, and not based on any other material and were not estimates, have therefore, to be regarded as assessments made under section 12(1) to which the penal provisions of section 12(3) are not attracted. The levy of penalty for those two assessment years is set aside."

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6. The above statement of law would squarely cover the issue in this case against the Revenue. Hence the order impugned in the writ petition is liable to be set aside and accordingly the same is set aside. The writ petition is allowed. Consequently, the connected W.M.P is closed. No costs.

krr/

Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Registrar
Tamil Nadu Taxation Special Tribunal
Singaravelar Maaligai
Rajaji Salai,Chennai 1.

2. The Commmercial Tax Officer
Vadapalani Assessment Circle
Chennai 29.

+ One cc to Spl Govt Pleader SR 64855
+ One cc to Mr. A. Thiyagarajan, Advocate SR 64695'

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